

Who is the Client?

A question that seems to vex Probate practitioners more than any other relates to a solicitors **responsibilities under Rule 15** and to whom those responsibilities are owed. The question is :- who should the practitioner regard as his client in Probate matters and what, if any, duties does he owe to those who are not his clients?

To answer this it is necessary to begin with some basic points.

Firstly, in dealing with an estate, the only person who can be the solicitor's **client is the executor**, or, obviously, the executors if there are more than one.

It follows that the executor is the only person to whom a solicitor owes a duty under Rule 15 and so is the only person to whom a solicitor is obliged to give costs information and, subject to the exception mentioned below, is the only person who can raise a service complaint which the solicitor is obliged to deal with.

Secondly, only a client can benefit from a compensatory award in the event of a finding of inadequate professional service (IPS) by the OSS, so that a compensatory award can only be made in favour of an executor.

Thirdly, the OSS does not need a complaint from a client to enable it to investigate complaints of IPS. Any doubts about this were removed by **Schedule 7 para 11 (2) (c) of the Access to Justice Act 1999**.

Having said that, the OSS will not normally accept complaints of inadequate service from someone who is not a client of the solicitor complained of. The reason is that solicitors only owe a duty of service to their own clients. Usually, when complaints come from another source, they either come from the other party in a matter ie the opponent whose interests are diametrically opposed to those of the solicitor's own client, or from interfering relatives who don't like the result achieved, even though the client may be quite content.

However, that situation does not hold good in Probate matters and it does not take much thought to realise why.

As will be readily appreciated, it would be nonsensical to have a situation where beneficiaries, who are not clients of the solicitor because he himself is the executor and is therefore his own client, had to refer complaints to the solicitor because he was the executor, and, as executor, he could then just tell the beneficiaries that they had no grounds for complaint and he was satisfied that he, with his solicitor's hat on, was dealing with things perfectly properly.

If **residuary beneficiaries**, who are more interested than anyone else in the adequate handling of the estate, were not able raise genuine complaints with the OSS, they would, in fact, have no redress and no-one they could turn to for help if, for instance, there was unreasonable delay in the winding up of the estate without having to embark on potentially expensive litigation.

If such complaints are found to be substantiated, the only sanction available is a

reduction in the solicitor's fees, with, obviously, a consequent increase in the size of the residuary estate which would benefit the residuary beneficiaries.

Applying the above principles, it would now be appropriate to examine the three scenarios that can arise.

1. Where the **executors** of a Will **are laymen** and have no connection with the solicitor's firm and the solicitor is instructed by the executors to obtain Probate and to act in the administration of the estate.

In that case, the situation is clear. It is the executor (or both of them if there is more than one) who is the client and it is the executor to whom all the information required by Practice Rule 15 should be given and he is the only person entitled to make a complaint with which the solicitor is obliged to deal in accordance with his firm's Complaints Procedure.

In practice it is found that many complaints arise out of disagreements between beneficiaries and executors. If a complaint is received from a beneficiary, whether specific or residuary, there is no compulsion on a solicitor to deal with it and the beneficiary can be politely referred to the executor with an accompanying explanation that it is the executor who is the client and that it would, therefore not be correct for you, the solicitor, to correspond with the beneficiary, eg for reasons of confidentiality. However, where there is no over-riding reason why the solicitor should not answer the matters raised by the Residuary Beneficiary, it would be preferable for him to tell the Residuary Beneficiary that, subject to him obtaining his client's (the executor's) consent, he will deal with the matters raised. It might also be good public relations to give residuary beneficiaries costs information and to let them know how matters are progressing. After all, it is the Residuary Beneficiary who is, in effect, paying the bill!

2. Where the **solicitor**, or a member of his firm, is appointed to be the **executor** of the Will and he so acts in obtaining Probate and administering the estate. (The following observations will, of course, apply equally to cases where there is more than one executor and all the executors are members of the same firm.)

In those circumstances the solicitor/executor is his own client and there is no obligation upon the solicitor to give costs, or any other Rule 15, information to anyone else and the solicitor will not suffer a costs reduction or be required by the OSS to pay compensation for failing, for example, to give costs information to a residuary beneficiary.

With regard to the question of general service complaints eg delay, failing to account etc. the position, as indicated above, is somewhat different.

It is to guard against that kind of situation, where, in effect, a solicitor can act as judge in his own cause, that the OSS **will** contemplate complaints by a residuary beneficiary where there is no lay executor who can take up the complaints on behalf of the residuary beneficiaries. Likewise, the solicitor should deal with such complaints.

3. Where the solicitor is a **joint executor with a layman**. Here the situation is more complicated and less definite.

All really depends on the nature, or standing, of the lay executor. This is where it all becomes something less than an exact science, as one has to make a judgement about the standing of the lay executor.

In these circumstances, as, hopefully, will now be readily appreciated, it is the solicitor and the lay executor together who are the clients. The lay executor is the person who is entitled to the Rule 15 information and from whom the solicitor has to accept complaints.

If the lay co-executor is not even a beneficiary of any kind and has been appointed simply because he was an old friend of the deceased and someone the deceased felt could be relied upon to see that his wishes were carried out, his function with regard to the realisation of the estate being restricted to signing forms, he may well not have sufficient personal interest to pursue any complaint raised by a beneficiary. Under those circumstances, particularly if the lay executor is elderly, the situation would not be regarded in the same way.

It is still the lay executor who is the solicitor's client and who is the person solely entitled to the relevant information under Rule 15 and there would, therefore, still be no redress for a residuary beneficiary who received no costs information, but he could get redress, albeit indirectly by way of a costs reduction, for other complaints related to the service afforded.

The position is different with regard to **dealing with complaints**, because it is more akin to that under 2. above, and, consequently, the OSS would expect a solicitor to deal with complaints that come from any one, or more, of the residuary beneficiaries. The difficulty, of course, is that the position may not be quite so clear cut as it is in the examples given above so that one would be forced into making a subjective decision as to whether or not complaints ought to be dealt with under the firm's Complaints Procedure.

Perhaps the better view would be, as suggested above, and it is an attitude that the OSS would encourage, and indeed one which, on reflection, you as the solicitor may think makes commercial sense, that, no matter what the strict interpretation may be, it would be in the interests of good client relations to **treat all residuary beneficiaries as if they were clients**, even if, strictly speaking, they are not. Certainly, as indicated above, the OSS would prefer solicitors to deal with service complaints from residuary beneficiaries as if they were clients. That would also seem to be the view taken by the Ombudsman and Consumer organisations who, it would appear, would like to see a harder line taken whereby solicitors were obliged to accept, and deal with, complaints from residuary beneficiaries.

However, it is possible to conceive of circumstances where that may not be desirable, for example if the complaint arises from a family squabble, or if just one of many residuary beneficiaries seeks to raise a matter when all the others are perfectly happy. There was, for instance, one complaint referred to the OSS by a residuary beneficiary who refused to sign the accounts until his complaints had been dealt with to his satisfaction, thus holding up the distribution of the estate to each of the other 22



beneficiaries, all of whom had no complaint whatsoever.

It is also fair to say that, subject to how many of them there are, the OSS would like solicitor/executors to **give Rule 15 information to residuary beneficiaries** and keep them informed of progress, although there is no obligation to do so. Indeed, you may think it sensible from both a public relations and a “potential client” point of view, to do this, thus treating such people at all times as if they are clients.

Perhaps the best way of addressing that type of situation, assuming you are prepared to do so, would be for you to write to the residuary beneficiaries at the outset of the matter giving them the normal costs information and explaining that, although it is the executor who, strictly speaking, is the client, you are prepared, if the **residuary beneficiaries all agree**, to keep them informed as to progress at set intervals and also setting out the anticipated cost of giving them that information, or explaining how the cost will be calculated. You can explain that it is necessary for them all to agree in order to avoid a complaint from any beneficiary who later maintains they did not want such information and that costs have been wasted.

One final point.

It should also be born in mind that, in cases where there is no lay executor, residuary beneficiaries have the specific right to apply for a Remuneration Certificate.